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<https://www.arb.ca.gov/lispub/comm2/bcsubform.php?listname=leviii-ghgdtc2018-ws&comm%20period=1>

RE: Request for Public Input on Potential Alternatives to a Potential Clarification of the “Deemed to Comply” Provision for the LEV III GHG Emission Regulations for Model Years Affected by Pending Federal Rulemakings

The Emmett Institute on Climate Change and the Environment at UCLA School of Law respectfully submits this letter in support of the California Air Resources Board (CARB)’s proposed actions to clarify its “deemed to comply” provision in light of current federal rulemakings. CARB has longstanding authority to maintain its own new motor vehicle emission control program independent of any federal program so long as it has a waiver from the U.S. Environmental Protection Agency. Preserving the intended stringency of California’s vehicle emissions program is necessary to protect public health and welfare. As we explain below, any clarification to CARB’s regulations to maintain the status quo would fall within the scope of the previously-granted federal waiver for California’s Advanced Clean Cars program.

I. California has authority to set its own GHG vehicle emission standards independent of federal standards.

California’s unique historical role in the regulation of emissions from new motor vehicles and engines has been recognized for more than 50 years and is reflected in the Clean Air Act. EPA must grant California a preemption waiver so long as the state’s emission standards are “at least as protective of public health and welfare as applicable Federal standards,” unless EPA finds the standards are not necessary “to meet compelling and extraordinary conditions” or the standards and accompanying enforcement procedures are inconsistent with section 202(a) of the

Clean Air Act.¹ The EPA has granted requests for preemption waivers to California for each iteration of its vehicle emission standards.²

California’s authority includes the power to adopt greenhouse gas (GHG) vehicle emission standards, as recognized by EPA in 2009.³ And these GHG vehicle emission standards are not preempted by vehicle mileage standards enacted at the federal level.⁴ As the United States Supreme Court established in *Massachusetts v. EPA*, the Department of Transportation’s (DOT) authority to enact fuel economy standards under the Energy Policy and Conservation Act does not displace EPA’s authority to regulate GHG emissions from motor vehicles under the Clean Air Act.⁵ Likewise, district courts have repeatedly held that California’s GHG vehicle emission standards are neither preempted by nor in conflict with fuel economy standards enacted at the federal level.⁶

¹ See Clean Air Act § 209(b), 42 U.S.C. 7543(b).

² For example, the EPA has granted numerous preemption waivers for California’s light and medium duty vehicle emission standards over the last several decades. See, e.g., 78 Fed. Reg. 2112 (Jan. 9, 2013) (ACC program); 76 Fed. Reg. 61095 (Oct. 3, 2011) (ZEV amendments); 74 Fed. Reg. 32744 (July 8, 2009) (GHG standards); 71 Fed. Reg. 78190 (Dec. 28, 2006) (ZEV program); 70 Fed. Reg. 22034 (April 28, 2005) (LEV II amendments); 68 Fed. Reg. 19811 (April 22, 2003) (LEV II); 63 Fed. Reg. 18403 (April 15, 1998) (LEV I).

The EPA has denied only one waiver request (in March 2008, for California’s first GHG vehicle emission standards). California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156 (March 6, 2008). However, this denial was later rescinded, and California was eventually granted a waiver for its GHG vehicle emission standards in July 2009. California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (July 8, 2009) [hereinafter 2009 GHG Waiver Approval].

³ 2009 GHG Waiver Approval, *supra* note 2.

⁴ See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007).

⁵ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s ‘health’ and ‘welfare,’ 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. See Energy Policy and Conservation Act, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency. . . . Because greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant’ we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”).

⁶ *Green Mountain Chrysler*, 508 F.Supp.2d at 397-99; *Central Valley Chrysler-Jeep*, 529 F.Supp.2d at 1189.

Furthermore, the state’s authority to issue GHG standards does not depend on the presence of unified national motor vehicle standards, such as those created by the current agreement among automakers, the federal government, and California. California’s authority to issue GHG vehicle emission standards, like its authority to issue standards for other pollutants, is based on Congressional intent to recognize “California’s pioneering role in setting mobile source emission standards”—an intentional choice “to allow California to have standards more stringent than Federal standards.”⁷

The fact that some aspects of California’s motor vehicle emissions control program currently align with federal standards does not remove the legal justification for California to maintain standards that are more protective of public health and welfare than federal standards.

II. Maintaining the current stringency of California’s vehicle emission program is necessary to protect public health and welfare.

The Advanced Clean Cars (ACC) program as a whole substantially reduces emissions of both GHGs and criteria pollutants. The program is crucial both to meet the state’s overall GHG reduction goals and to attain state and national health-based ambient air quality standards.⁸ As discussed in the ACC Draft Environmental Analysis, less stringent emissions standards “would limit the ability of various air districts throughout the State to attain the State and national ambient air quality standards in their respective air basins” and “prevent California from achieving the GHG reduction goal of AB 32.”⁹ Maintaining the current stringency of California’s vehicle emission program is essential to California’s ability to reduce emissions as required by both state and federal law.

EPA’s re-opening of the national vehicle standards may thus impede California’s ability to meet its public health and GHG emission reduction goals if EPA attempts to rescind California’s authority to adopt more stringent standards. As with CARB’s prior action with respect to glider vehicles, California cannot rely on the current administration’s approach to developing, implementing, and enforcing science- and health-based standards.¹⁰ We support

⁷ 2009 GHG Waiver Approval, *supra* note 2, 74 Fed. Reg. at 32754-55.

⁸ Draft Environmental Impact Analysis for the Advanced Clean Cars Program at 22-23, CARB (Dec. 7, 2011), available at <https://www.arb.ca.gov/regact/2012/leviiighg2012/levappb.pdf> (defining the ACC program’s objectives to include meeting national and state ambient air quality goals, as well as the GHG reduction goals of AB32).

⁹ *Id.* at 193.

¹⁰ See Proposed California Greenhouse Gas Standards for Medium- and Heavy-Duty Engines and Vehicles and Proposed Amendments to the Tractor-Trailer GHG Regulation (Staff Report: Initial Statement of Reasons for Proposed Rulemaking) at ES-7, CARB (Dec. 19, 2017), available at <https://www.arb.ca.gov/regact/2018/phase2/isor.pdf> (“Given the current political climate and its potential to impede the continued implementation of the existing federal Phase 2 regulation, CARB staff does not believe the ‘deemed to

proposed regulatory actions by CARB to maintain the current stringency of California’s standards and ensure that weakened federal standards will not undermine California’s program.

III. California’s Code of Regulations may be ambiguous as to which federal standards may be “deemed to comply” with California’s standards.

The “deemed to comply” provision currently allows manufacturers to elect to comply with California’s standards by “demonstrating compliance with the 2017 through 2025 MY National greenhouse gas program.”¹¹ The regulation defines the 2017 through 2025 MY National greenhouse gas program as “the national program that applies to new 2017 through 2025 model year passenger cars, light-duty trucks, and medium duty passenger vehicles as adopted by the U.S. Environmental Protection Agency as codified in 40 CFR part 86, Subpart S.”¹² This language may leave ambiguous whether the “deemed to comply” provision applies to whatever standards are codified in the Code of Federal Regulations, regardless of stringency, or instead only to those standards that were in effect when the regulation was adopted (and substantially similar standards).

CARB’s actions during its midterm review support the latter reading. In 2017, the agency opted to “allow[] for compliance with the adopted U.S. EPA GHG standards for 2022 through 2025 model years” based on EPA’s January 13, 2017 Final Determination affirming that the national GHG standards for model year 2022-2025 would remain unchanged.¹³ Of course, this decision was necessarily based on “the existing national GHG standards” that EPA determined would remain, and which CARB found “still put[] California on track to achieve the projected GHG reductions from the 2025 model year fleet.”¹⁴ CARB specifically noted that California would need to revisit this finding if the federal standards were weakened so that the state could determine whether “compliance with a new National Program would be an appropriate approach under California’s LEV III program to address California’s unique air quality challenges and its mandates to achieve aggressive GHG reductions to protect public health and the environment.”¹⁵

comply’ approach that was used in Phase 1 is appropriate. California cannot currently rely on federal review of applications for engine and vehicle certification.”).

¹¹ CAL. CODE REGS. tit. 13, § 1961.3(c).

¹² *Id.* § 1961.3(f)(25).

¹³ CARB, California’s Advanced Clean Cars Midterm Review: Summary Report for the Technical Analysis of the Light Duty Vehicle Standards, ES-4 (Jan. 18, 2017), *available at* https://www.arb.ca.gov/msprog/acc/mtr/acc_mtr_summaryreport.pdf.

¹⁴ *Id.*

¹⁵ *Id.*

This supports the view that the “deemed to comply” provision was meant to apply only to federal standards that kept California on track to achieve its GHG reduction goals—that is, standards substantially similar to the original MY 2017-2025 standards adopted in 2012.

Given any remaining ambiguity, however, amending section 1961.3(c) to clarify that only compliance with the 2017 through 2025 model year national greenhouse gas program as of May 7, 2018¹⁶ will be deemed to comply with California’s regulations may be warranted.

IV. If CARB takes regulatory action to clarify the “deemed to comply” provision, such an amendment would fall within the scope of California’s previously granted federal waiver for the Advanced Clean Cars program.

Clarifying CARB’s regulations to maintain the original intent of the “deemed to comply” provision should fall within the scope of the waiver previously granted in 2013 for the ACC program. EPA has determined that when California acts to amend a previously waived standard, the amendment may be considered within the scope of a previously granted waiver so long as (1) the amendment does not undermine California’s determination that its standards in the aggregate are as protective of public health and welfare as applicable federal standards, (2) it does not affect the regulation’s consistency with section 202(a) of the Clean Air Act, and (3) it raises no new issues affecting EPA’s previous waiver decisions.¹⁷

¹⁶ CARB proposed May 7, 2018 (the date of the request for public input notice) as the effective date, but we support using any effective date that will allow the agency to maintain the current stringency of its regulations.

¹⁷ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program and a Within the Scope Confirmation for California’s Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2120 (Jan. 9, 2013). EPA has consistently applied this standard over multiple administrations. *See, e.g.*, California State Motor Vehicle Pollution Control Standards; Within-the-Scope Determination for Amendments to California’s Low Emission Vehicle Program; Notice of Decision, 75 Fed. Reg. 44948, 44949 (July 30, 2010) (“If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within-the-scope of the previously granted waiver if three conditions are met. First, the amended regulations must not undermine California’s determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any ‘new issues’ affecting EPA’s prior waivers.”); California State Motor Vehicle Pollution Control Standards; Notice of Within-the-Scope Determinations for Amendments to California’s Heavy-Duty Vehicle and Engine Standards for 1995 Urban Bus and 1998 NOX Regulations, 69 Fed. Reg. 59920, 59921 (Oct. 6, 2004) (“In a February 27, 1997, letter to EPA, CARB notified EPA of the above-described amendments to its heavy-duty vehicle and engine regulations and asked EPA to confirm that these amendments are within-the-scope of previous waivers. EPA can make such a confirmation if certain conditions are present. Specifically, if California acts to amend a previously waived standard or accompanying enforcement procedure, the amendments may be considered within-the-scope of a previously granted waiver provided that it does not undermine California’s determination that its standards in the aggregate are as protective of public health and welfare as applicable Federal standards, does not affect the consistency with section 202(a) of the Act, and raises no new issues affecting EPA’s previous authorization determination.”); California State Motor

An amendment of the type CARB contemplates would satisfy these three requirements. First, far from undermining California’s prior determination that its standards are as protective as federal standards, clarifying the “deemed to comply” provision would ensure that California’s standards remain exactly as protective of public health and welfare as the previously waived standards. CARB seeks to maintain its current standards, not to change them. This clarification would resolve any ambiguity in California’s regulations to ensure that its standards achieve the emissions reductions contemplated by the previously waived standards. Accordingly, California’s standards would remain at least as protective of public health and welfare as the federal standards.

Second, CARB’s proposed action would not affect consistency with section 202(a) of the Clean Air Act because the clarification would not change any standards. It would maintain the standards currently in force by clarifying that the “deemed to comply” provision only applies to the federal standards in force as of May 7, 2018.¹⁸

Finally, clarifying the “deemed to comply” provision would not raise any new issues affecting EPA’s previous waiver decisions. In fact, the opposite is true. By clarifying that the “deemed to comply” provision applies to the current federal standards, CARB would avoid the new issue of whether manufacturers could use potentially weaker federal standards to comply with California’s standards and thereby prevent California from achieving its GHG emission and air pollution reduction targets. The clarification would ensure that no issues arise and that the status quo is preserved.

Moreover, applying EPA’s three-part test to assess whether amendments fall within the scope of the prior waiver, rather than subjecting any amendment to a full waiver analysis, would be the appropriate analytical approach here. In prior proceedings, EPA has noted that amendments “add[ing] additional pollutants or a new type of vehicle for the first time” would require a full waiver analysis.¹⁹ On the other hand, amendments where “CARB has either made minor or technical amendments to previously waived regulations” would be evaluated as within

Vehicle Pollution Control Standards; Waiver of Federal Preemption—Notice of Within-the-Scope Determination, 66 Fed. Reg. 7751, 7752 (Jan. 25, 2001) (“EPA may consider CARB’s amendments or regulations to be within the scope of a previously granted waiver if the amendment does not undermine California’s determination that its standards, in the aggregate, are as protective of public health and welfare as comparable Federal standards, does not affect the consistency of California’s requirements with section 202(a) of the Act, and does not raise new issues affecting EPA’s previous waiver determination.”).

¹⁸ See note 16, *supra*.

¹⁹ California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, Decision of the Administrator (2005 and Subsequent Model Year Zero-Emission Vehicles (ZEV)) at 19-20, Decision Document, Docket No. EPA-HQ-OAR-2004-0437 (Jan. 3, 2007), available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0437-0173>.

the scope of a prior waiver.²⁰ An amendment of the type CARB is considering is exactly the kind of minor amendment that should not be subject to a full waiver analysis. It would not impose new or more stringent pollutant standards. The proposal “would not change any of the regulatory requirements in the CARB LEV III GHG regulation.”²¹ Rather, it would simply seek to maintain the status quo.

V. Conclusion

The Emmett Institute supports action by CARB to maintain the current stringency of California’s vehicle emission program in light of the attempted weakening of standards at the federal level. If CARB proposes amending its regulations to clarify that only compliance with the original MY 2017-2025 federal standards will be deemed to comply with California’s standards, we believe such action would fall within the scope of the prior federal waiver for the Advanced Clean Cars Program.

Respectfully submitted,



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²⁰ *Id.* at 18.

²¹ Request for Public Input on Potential Alternatives to a Potential Clarification of the “Deemed to Comply” Provision for the LEV III GHG Emission Regulations for Model Years Affected by Pending Federal Rulemakings, CARB (May 7, 2018) at p.3.